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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)
)
Petition for Declaratory)
Ruling Filed by Wireless)
Consumers Alliance, Inc.)
)
)
To: Chief, Wireless)
Telecommunications Bureau)

WT Docket No. 99-263
DA 99-1458

COMMENTS ON DECLARATORY RULING

Tritel Communications, Inc. ("Tritel") pursuant to the Commission's Public Notice^{1/} hereby comments on the Petition for Declaratory Ruling ("Petition") submitted by Wireless Consumers Alliance, Inc. ("WCA"). WCA seeks a Declaratory Ruling on Communications Act provisions and FCC jurisdiction regarding preemption of state courts from awarding monetary damages against CMRS providers for violation of consumer protection or other state laws.

I. BACKGROUND

Tritel is a C Block success story -- one of the few that exists. Through its subsidiaries and affiliates, it is the holder several PCS licenses in the southeastern United States. It obtained its licenses through competitive bidding in the C-Block

^{1/} Public Notice, DA 99-1458, released July 28, 1999.

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PCS auction, and is one of the few C-Block licensees who is poised to establish a viable, competitive wireless system. Quite simply, Tritel was a start-up company that evolved into a already competitive marketplace that was the result of a congressionally created federal regulatory environment. Any FCC ruling on this matter will directly effect Tritel as a wireless entity who is already expressly prohibited from engaging in "unjust or unreasonable charges or practices" under the Communications Act.

II. Mischaracterization of Los Angeles Cellular Telephone Company's Argument

Initially, WCA characterizes LA Cellular's preemption argument as that "any action for damages against a CMRS provider can only be brought before the Commission or the U.S. district Court pursuant to the applicable provision of the Communications Act."^{2/} Contrary to WCA's mischaracterization of LA cellular argument, LA Cellular is arguing only that FCC preemption is required by 47 U.S.C. §332 (c) (3) (a) ("Section 332")⁰ when the state court has to make a determination as to [CMRS] rates when calculating damages.^{3/} We do not find anywhere in LA Cellular's pleadings filed in state court

^{2/} Petition for Declaratory Ruling at ii.

^{3/} Section 333(c)(3)(A) states that "[n]otwithstanding sections 152(b) and 221(b) of this title, no State or Local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services..."

the proposition that all actions for damages against CMRS providers must be preempted by federal law.

III. Issue Presented by WCA

Tritel challenges WCA's characterization of the issue in its Petition for Declaratory Ruling. WCA broadly sets forth the issue as "whether, as a matter of law, the Communications Act and/or the FCC jurisdiction thereunder preempts state courts from awarding monetary relief to consumers against CMRS providers for violating state consumer protection, tort and/or contract law."^{4/} It further states that the FCC is not required to have knowledge of the fact in the LA Cellular case or any other case pending before a state court.^{5/}

Contrary to WCA's contention, FCC preemption of state actions seeking monetary damages involving a CMRS provider is dependant on the facts, as evidenced by the suit brought against LA Cellular. In the underlying proceeding, plaintiffs seek damages for the difference between the value of the cellular service advertised by LA Cellular and the value of the service actually received by the Plaintiffs. As the California Superior Court correctly concluded, this determination would require the court to calculate the price difference between the service the plaintiffs were charged for and the service they actually received. Thus, in order to determine

^{4/} Petition for Declaratory Ruling at 2.

^{5/} *Id.*

the difference in value, the California Superior Court would have to make a determination as to the "price" of the service the plaintiffs actually received from LA Cellular.

IV. Section 332(c)(3)(A)

Because this determination indirectly regulates rates of a CMRS provider, as explained below, it is expressly prohibited by Section 332. Thus, the FCC would not be adhering to Section 332 as requested by WCA, it makes a general determination to not preempt all cases involving suits against CMRS providers for violating state consumer protection, tort and/or contract law. Section 332(c)(3)(A) expressly preempts all forms of state regulation of rates charged by CMRS providers. Regulation of rates can be achieved indirectly, such as monetary relief through a claim of inadequate service, in addition to a direct challenge that the rate itself is unreasonable. Specifically, the courts have concluded that states awarding monetary damages for violations of state consumer protection laws can be construed as rate-setting that is preempted by section 332(c)(3)(A) of the Communications Act.

For example, in Comcast Cellular Telecom. Litigation, 949 F.Supp 1193 (E.D.Pa. 1996), the Court determined that allegations of violating state Unfair Trade and Consumer protection laws, breach of contract, breach of implied duty of good faith and fair dealing, and unjust enrichment and restitution presents "a direct challenge to the calculation of rates charged by Comcast for

cellular telephone service. The Court further explained that the remedies they seek would require a state court to engage in regulation of the rates charged by a [cellular service] provider, something it is explicitly prohibited from doing."

In LA Cellular, if WCA's recourse is granted, the California Superior Court would be required to determine the value of the service actually received by consumers when calculating damages, restitution, and/or disgorgement. Thus, the state court would be regulating "the rate charged" by a CMRS provider, which is expressly prohibited by section 332(c)(3)(A).

V. Federal Remedies Available

Congress provides the FCC with authority to act on matters involving allegations of "unjust or unreasonable charges or practices" by CMRS providers; 47 U.S.C. ¶ 201(b), and to recover damages against a CMRS provider for actions the carrier may be liable under the Communications Act. 47 U.S.C. ¶ 201(b). Congress specifically provides the FCC with these broad statutory powers to compose remedies to address "unjust or unreasonable charges or practices," such as the types of allegations brought by the plaintiffs in the LA Cellular Case. As previously stated, federal preemption is statutorily required when a state court will have to determine "rates" of CMRS providers when calculating the award of damages. Nonetheless, it does not bar the award of damages from claims of "unjust or unreasonable charges or practices" as these

claims can be brought before the FCC. Further, because the FCC is the primary agency regulating the wireless industry, there is no reason to believe that the FCC or even Federal Courts would not have the expertise in resolving claims brought against wireless providers.

VI. Policy Implications

Finally, there are important policy implications dependant on a Declaratory Ruling on this matter. A competitive wireless marketplace has emerged because of the federal regulatory environment established by Congress. The FCC has primary jurisdiction in most matters involving CMRS providers. Tritel, as well as many other small, wireless providers, evolved in a marketplace regulated by the FCC that encouraged competition and creativity. This environment is important for wireless carriers, such as Tritel, who seek growth within a consistent marketplace. Tritel concludes that the FCC must preserve this environment by maintaining its preemption rights in all instances where a state court is required to determine CMRS "rates" when calculating damages, even if it involves state consumer protection, tort, and/or contract issues. A broad, general ruling by the FCC indicating that it will not preempt any cases involving state consumer protection, tort, and/or contract issues will strike a blow to the regulatory environment creating by Congress and carried out by the FCC over the past several years.

VII. CONCLUSION

Tritel opposes WCA's Petition for Declaratory Ruling seeking a mandate from the FCC to not exercise its statutory preemption authority in cases where consumers seek monetary relief against CMRS providers for violating state consumer protection, tort and/or contract law. Rather, Tritel supports a FCC Ruling that maintains the FCC's preemption authority in any case that would require the state court to determine "rates" of CMRS providers when calculating an award of damages. Tritel finds that such a ruling is consistent with congress' express authority and the case law supports federal preemption authority in these instances. Further, the policy of maintaining consistent federal regulation and the availability of federal remedies to parties alleging "unjust or

unreasonable charges or practices" by CMRS providers strengthens preemption by the FCC in cases such as LA Cellular.

Respectfully submitted,

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